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# One Step Forward, Two Steps Back: Summary Judgment After *Celotex*

by  
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As courts and commentators seek solutions to the perceived litigation explosion of recent years,<sup>1</sup> summary judgment has gained renewed appeal as a means of terminating litigation without the expense and delay of trial.<sup>2</sup> The Supreme Court fueled this trend by deciding three summary judgment cases in one Term.<sup>3</sup> These cases convey the distinct, if not explicit, message that summary judgment is not "a disfavored procedural shortcut."<sup>4</sup> Rather, by weeding out factually insufficient claims and defenses,<sup>5</sup> it serves as an important tool for accomplishing the pri-

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1. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 76-77 (1985); Burger, *Annual Report on the State of the Judiciary*, A.B.A. J., Mar. 1982, at 274 (Transcript of an address to the A.B.A. midyear meeting in Chicago (Jan. 1982)). *But see*, Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

2. *See, e.g.*, Schwarzer, *Summary Judgment: A Proposed Revision of Rule 56*, 110 F.R.D. 213 (1986); Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984); Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U.L. REV. 774 (1983).

3. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986). *Celotex* and *Anderson* were decided on the same day. *Matsushita* was decided three months earlier.

To avoid confusion among the *Celotex* decisions, the trial court decision will be referred to as "*Celotex I*"; "*Celotex II*" will indicate the first court of appeals decision, reported at *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181 (D.C. Cir. 1985); "*Celotex III*" will indicate the Supreme Court opinion, reported at *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and "*Celotex IV*" will indicate the second court of appeals decision, on remand from the Supreme Court, reported at *Catrett v. Johns-Manville Sales Corp.* 826 F.2d 33 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1028 (1988).

4. *Celotex III*, 477 U.S. at 327.

5. *See* Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1119 (1986) ("*Celotex* and *Anderson*, together with [*Matsushita*], signal an end to Supreme Court hostility toward sum-

mary goal of the Federal Rules of Civil Procedure—"the just, speedy, and inexpensive determination of every action."<sup>6</sup>

The three decisions were the product of narrow, shifting alliances on the Court on the specific issues raised in each case.<sup>7</sup> Considered together, the opinions clearly indicate that the Court intended to encourage the use of summary judgment in appropriate cases. The strong dissents in each case, however, indicate that there is no consensus on the Court about how to do so while preserving the nonmoving party's procedural protections. This Article will focus on the broadest of the three cases, *Celotex Corp. v. Catrett*, which illustrates this dilemma particularly well.<sup>8</sup>

One troubling area in summary judgment law has been the standard

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mary judgment motions."); Note, *The Supreme Court—Leading Cases*, 100 HARV. L. REV. 100, 258 (1986) ("*Celotex* and *Anderson* thus should allow federal trial courts to use summary judgment to slash high litigation costs and trim overcrowded court dockets.").

6. FED. R. CIV. P. 1.

7. In *Celotex III*, Justice Rehnquist wrote the majority opinion, which was joined by Justices Marshall, Powell, O'Connor, and White; Justices Brennan, Blackmun, Stevens, and former Chief Justice Burger dissented. In *Anderson*, Justice White wrote the majority opinion, joined by Justices Marshall, Blackmun, Powell, Stevens, and O'Connor; Justices Brennan, Rehnquist, and former Chief Justice Burger dissented. In *Matsushita*, Justice Powell wrote the majority opinion, joined by former Chief Justice Burger and Justices Marshall, Rehnquist, and O'Connor; Justices White, Brennan, Blackmun, and Stevens dissented.

8. *Anderson* was a libel case in which the Court held that the trial judge must take into account the substantive evidentiary burden—there, clear and convincing evidence—that will apply at trial in deciding a summary judgment motion. In the course of the opinion, the Court adopted the moving party's suggestion that the "genuine issue" standard on summary judgment "mirrors" the directed verdict standard at trial under FED. R. CIV. P. 50(a). *Anderson*, 477 U.S. at 250. The majority in *Celotex III* quoted this language with approval and discussed its implications on summary judgment for a nonmoving party who would have the burden of proof at trial. See *infra* note 62 and accompanying text. The analogy between directed verdict and summary judgment has long been discussed and will not be considered in detail here. See 10 C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2713.1, at 613-19 (2d ed.1983); Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72 (1977); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 748 (1974). The dissenters in *Anderson*, however, thought that the majority was encouraging far more weighing of the evidence by the trial judge than is proper on either a summary judgment or a directed verdict motion. *Anderson*, 477 U.S. at 265-68 (Brennan, J., dissenting), 269-73 (Rehnquist, J., dissenting); and it is unclear what the practical effect of assimilating the two standards will be. See Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433 (1987).

*Matsushita* was an antitrust case which raised the substantive question of what inferences were permissible from ambiguous evidence in a case brought under § 1 of the Sherman Act. The district court granted summary judgment to the defendants, and the Third Circuit Court of Appeals reversed. The Supreme Court reversed the court of appeals, finding that the evidence presented by plaintiffs in opposition to summary judgment did not "tend[] to exclude the possibility" that the alleged conspirators acted independently" rather than as part of a price-fixing scheme, as the substantive law requires. *Matsushita*, 475 U.S. at 588. In the absence of such evidence, the Court held that there was no genuine issue of fact for trial and summary judgment was proper. *Id.* at 597.

of proof required to meet the moving party's initial burden of producing evidence in support of the motion.<sup>9</sup> When the moving party will have the burden of proof at trial, the standard can be analogized to that required to obtain a directed verdict at trial. When the nonmoving party will have the burden of proof at trial, however, what does the moving party have to show the court in order to meet its initial burden and to shift the burden to respond to the nonmoving party? More specifically, how does the moving party *demonstrate* the absence of an issue that has already been denied in the pleadings? In *Celotex*, the plaintiff alleged that her deceased husband had been injured by exposure to the defendant's asbestos products. Celotex denied exposure and sought summary judgment on the grounds that, in the course of discovery, the plaintiff had not produced evidence of the claimed exposure. The district court granted summary judgment but the court of appeals reversed, holding that Celotex had to negate the allegation of exposure in order to meet its initial burden.

The difficulty of "proving the negative"<sup>10</sup> is an obstacle to obtaining summary judgment even if the nonmoving party's case in chief will fail at trial for lack of proof.<sup>11</sup> The Supreme Court in *Celotex* dealt with this problem by redefining the moving party's initial burden. The Court held that when the *nonmoving* party will have the burden of proof at trial, the moving party can meet its initial burden on summary judgment merely by pointing to the absence of evidence in the record to support an essential element of the nonmoving party's case.<sup>12</sup> In announcing this standard, however, the majority in *Celotex* failed to delineate just how the standard would work in practice and, in particular, how it would coordinate with the discovery rules. Also, the majority misread the record on appeal by ignoring the fact that Celotex had made not one but two sum-

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9. The moving party on a summary judgment motion has both the initial burden of going forward and the burden of proof on its claim that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. The burden of proof, unlike the burden of going forward, never shifts. Until and unless the moving party meets its initial burden, the nonmoving party need not produce any response to the motion; once the initial burden is met, however, the burden of going forward shifts to the nonmoving party. This Article refers to the moving party's initial burden of going forward as the "initial burden" and to the nonmoving party's burden of going forward once the initial burden has been met as the "burden to respond." The moving party on summary judgment may or may not be the party with the burden of proof at trial. Until *Celotex III*, the trial burden was not taken into account in defining the initial burden on summary judgment. See Louis, *supra* note 8, at 752.

10. *Celotex II*, 756 F.2d 181, 184 (D.C. Cir. 1985).

11. See Louis, *supra* note 8, at 752, for a discussion of the rationale for applying different proof standards on summary judgment when the moving party will not have the burden of proof at trial.

12. *Celotex III*, 477 U.S. 317, 322 (1986).

mary judgment motions.<sup>13</sup> Indeed, the plaintiff's evidence of exposure was already in the record when the defendant's second motion, the one before the Court, was made.<sup>14</sup> Consequently, in its eagerness to announce a new standard for the moving party's initial burden, the majority reached the wrong result on the facts of the case, even under that standard. Finally, in remanding the case to the court of appeals for further consideration, the majority made several unsupported statements to the effect that the nonmoving party could successfully oppose a motion for summary judgment with evidence that would be inadmissible at trial. While this novel proposition saved the plaintiff's case from sudden death, it has no apparent support in Rule 56 nor is it justified by any procedural benefits. Additionally, it works against the Court's goal of making summary judgment more readily available in appropriate cases.

Commentary on *Celotex* to date has compounded the confusion by failing to recognize the factual errors made by the majority in deciding the case.<sup>15</sup> Those errors affect both the initial burden standard and the majority's approval of the nonmoving party's use of inadmissible evidence. Without taking these errors into consideration, it is difficult to understand what the Court said in *Celotex*, what it was trying to say, or what it should have said to promote the use of summary judgment in a sensible way. This Article discusses the initial burden standard adopted by the majority in *Celotex* and some of the problems addressed by the dissent. It analyzes the majority's position on the use of inadmissible evidence to oppose a summary judgment motion and argues that the majority's position is mistaken—adopted at least in part due to misreading the record—and should be repudiated by the Court at the earliest opportunity. Finally, the Article discusses the lower court's response to *Celotex* and analyzes the steps involved in seeking and opposing summary judgment after the decision in *Celotex*.

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13. *Celotex II*, 756 F.2d at 183 n.2.

14. *Id.* at 183-84.

15. See Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett with Adickes v. Kress and the Evidentiary Problems Under Rule 56*, 6 REV. LITIGATION 227 (1987); Note, *Federal Summary Judgment: The "New" Workhorse for an Overburdened Federal Court System*, 20 U.C. DAVIS L. REV. 955 (1987) (authored by Robert K. Smits) [hereinafter *Federal Summary Judgment*]. Other recent articles concentrate on the Court's discussion of the initial burden standard. See Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 6 REV. LITIGATION 263, 270-74 (1987); Note, *Civil Procedure—Celotex Corp. v. Catrett: Lessening the Moving Party's Burden for Summary Judgment?*, 17 MEM. ST. U.L. REV. 293 (1987) (authored by Elizabeth T. Collins); Note, *The Movant's Burden in a Motion for Summary Judgment*, 1987 UTAH L. REV. 731 (1987) (authored by Gary T. Foremaster).

## I. Background of *Celotex*

*Celotex* arose out of a widow's suit alleging that the death of her husband, Louis Catrett, was caused by exposure to asbestos manufactured or distributed by fifteen corporate defendants. The suit, *Celotex I*, was filed in the United States District Court for the District of Columbia in September 1980.

The defendant Celotex moved for summary judgment<sup>16</sup> in September 1981, but withdrew its motion in November after the plaintiff filed a response.<sup>17</sup> The motion was renewed in December 1981. In the second motion, Celotex argued that it was entitled to summary judgment on the ground that the plaintiff had failed to produce evidence of exposure "within the jurisdictional limits of the court."<sup>18</sup> Celotex also moved for a change of venue to the Northern District of Illinois, where any alleged exposure must have taken place.<sup>19</sup>

At the hearing on defendant's motions in July 1982, Judge Richey focused primarily on the lack of evidence of exposure in the District of Columbia. Although Mrs. Catrett contended that the location of her husband's exposure was relevant, if at all, only to the issue of appropriate venue,<sup>20</sup> the court granted summary judgment because there was "no

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16. Defendant Celotex Corporation's Motion for Summary Judgment, Joint Appendix at 73-83, *Celotex III*, 477 U.S. 317 (1986) (No. 85-198) [hereinafter Joint Appendix I].

17. Plaintiff's Motion in Opposition to Defendant Celotex Corporation's Motion for Summary Judgment, Joint Appendix 133-66, *Celotex III*, 477 U.S. 317 (1986) (No. 85-198). Attached as Exhibits C-E to Plaintiff's Memorandum of Points and Authorities in Opposition to Celotex's first summary judgment motion were three documents which are central to understanding the Supreme Court's decision in *Celotex*: (1) a letter to Louis Catrett's workers' compensation lawyer from William O'Keefe, a claims representative for Anning & Johnson Co.'s compensation carrier, summarizing a telephone conversation with T.R. Hoff, Assistant Secretary of Anning & Johnson Co., regarding Catrett's exposure to asbestos products while working for Anning & Johnson [hereinafter O'Keefe letter]; (2) a letter from Mr. Hoff to Mr. O'Keefe discussing Mr. Catrett's exposure to asbestos products while working for Anning & Johnson [hereinafter Hoff letter]; and (3) a copy of part of Mr. Catrett's deposition taken in an earlier workers' compensation case, describing his exposure to asbestos while working for Anning & Johnson [hereinafter Catrett deposition]. *Id.* at 160-64L. Plaintiff's memorandum specified that these documents were submitted on the issue of exposure to defendant's products. *Id.* at 142-44.

18. Defendant Celotex Corporation's Motion for Summary Judgment, Joint Appendix at 170, *Celotex III*, 477 U.S. 317 (1986) (No. 85-198) [hereinafter Joint Appendix II].

19. The basis for the venue motion appears to have been that plaintiff's three documents indicated that Mr. Catrett's only possible exposure to the products manufactured by Celotex's corporate predecessor took place in Illinois.

20. Transcript of Hearing on Celotex Corporation's Motion for Summary Judgment in United States District Court on July 21, 1982, Joint Appendix II, *supra* note 18, at 215.

showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period."<sup>21</sup>

In *Celotex II*, Mrs. Catrett appealed and the District of Columbia Circuit Court of Appeals reversed the trial court, over a strong dissent by former Judge Bork.<sup>22</sup> Certiorari was granted and, in a five to four decision with four separate opinions, the Supreme Court reversed the appellate court and remanded the case for further consideration (*Celotex III*).<sup>23</sup>

## II. The Decision in the Court of Appeals: *Celotex II*

A thorough understanding of the Supreme Court's new position on summary judgement requires an examination of the opinions rendered in the District of Columbia Circuit Court of Appeals. The court of appeals and, later, the Supreme Court, discussed two key issues. First, what is the standard of proof required to meet the moving party's initial burden of showing that there is no genuine issue as to any material fact? Second, after the moving party meets its initial burden, can the nonmoving party use inadmissible evidence to meet its burden to respond? The court of appeals split on both issues.

### A. The Majority Opinion

The majority opinion was written by Judge Kenneth Starr and joined by Judge Patricia Wald. They ruled that Celotex, as the party moving for summary judgment, failed to meet its initial burden and they reversed the trial court. Because Celotex failed to meet its initial burden, the majority did not examine the adequacy or sufficiency of the three documents in the record on which the plaintiff relied in opposing the motion.<sup>24</sup> In passing, however, the majority opened the door to a significant break with precedent by suggesting that the nonmoving party might not be required to use admissible evidence to meet its burden to respond.<sup>25</sup>

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21. *Id.* at 217 (emphasis added). The trial court also dismissed or granted summary judgment in favor of the remaining 14 defendants. Plaintiff appealed as to two others besides Celotex, but those appeals were discontinued upon settlement, before oral argument in the court of appeals. *Celotex II*, 756 F.2d 181, 183 n.1. (D.C. Cir. 1985).

22. *Celotex II*, 756 F.2d 181, 187 (D.C. Cir. 1985).

23. *Celotex III*, 477 U.S. 317 (1986).

24. *See supra* note 17.

25. *Celotex II*, 756 F.2d at 186.



*(1) Meeting the Moving Party's Initial Burden*

The majority found that Celotex's papers were "patently defective on their face" because Celotex "offered *no* affidavits, declarations, or evidence of any sort whatever in support of its . . . motion."<sup>26</sup> In so ruling, the majority strictly construed the language in Rule 56 that imposes on the nonmoving party a duty to respond only where a motion has been "made *and supported* as provided in this rule."<sup>27</sup> Thus, according to the majority, Celotex's failure to come forward with "*any* evidence" to disprove exposure rendered its motion "fatally defective."<sup>28</sup> The fact that exposure was an issue on which the *plaintiff* would have the burden of proof at trial did not alter the defendant's initial burden on summary judgment, even though, as the majority acknowledged, "Celotex may have faced difficulty . . . in 'proving the negative.'"<sup>29</sup>

The majority distinguished Celotex's summary judgment motion from a defendant's motion for a directed verdict at trial based on a plaintiff's failure to prove her case. In the trial situation, the majority reasoned, the burden would be on the plaintiff to either make a *prima facie* case of exposure or face a directed verdict.<sup>30</sup> At the summary judgment stage, however, the nonmoving party has no obligation to come forward with any evidence until and unless the moving party has met its initial burden of proving the absence of such exposure through its supporting papers.<sup>31</sup> While the majority did not specify just how much evidentiary

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26. *Id.* at 184.

27. FED. R. CIV. P. 56(e) (emphasis added). Celotex's December 1981 summary judgment motion, which was the subject of the appeal, was based solely on plaintiff's failure to produce any evidence of exposure to its products in the District of Columbia, as shown by the pleadings and her answers to interrogatories. Joint Appendix II, *supra* note 18, at 170.

28. *Celotex II*, 756 F.2d at 184.

29. *Id.* The majority cited a line of cases in the District of Columbia Circuit in support of its view that "the party moving for summary judgment carries the burden of proving the absence of a material issue of fact 'even on issues where the other party would have the burden of proof at trial.'" *Id.* at 185 n.11. This view had long been adhered to elsewhere as well. *See, e.g.,* National Indus., Inc. v. Republic Nat'l Life Ins. Co., 677 F.2d 1258, 1265 (9th Cir. 1982) ("The moving party has the burden of demonstrating the absence of a genuine issue of material fact, regardless of where the ultimate burden of proof would lie at trial."); Mack v. Cape Elizabeth School Bd., 553 F.2d 720, 722 (1st Cir. 1977) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-61 (1970)) ("A party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings . . . even though, as a defendant, he would have no burden if the case were to go to trial."); *Franklin Nat'l Bank v. L.B. Meadows & Co.*, 318 F. Supp. 1339, 1343 (E.D.N.Y. 1970) ("The moving party . . . has the initial burden of showing that there is no genuine issue of fact, even if on trial the burden of proof would lay with his opponent.").

30. *Celotex II*, 756 F.2d at 185.

31. *Id.*

support was required to meet the initial burden in this case,<sup>32</sup> it did conclude that Celotex's "barebones approach [would] not do."<sup>33</sup>

(2) *Using Inadmissible Evidence to Meet the Burden to Respond*

The *Celotex II* majority made several confusing, and contradictory, comments about the formal requirements for evidence submitted in opposition to summary judgment. At one point, referring to plaintiff's three documents,<sup>34</sup> the majority noted that the plaintiff *had* produced evidence of exposure to defendant's products. The majority opined that although the evidence "was not in admissible form, . . . at least some of the evidentiary infirmity was plainly curable."<sup>35</sup> Thus, the court implied that the evidence should have carried some weight at the summary judgment hearing below. Yet, at a later point, the majority indicated that if Celotex had presented a properly supported motion, "the inadmissibility of Mrs. Catrett's evidence would be fatal to her opposition to the motion."<sup>36</sup> As we shall see, the majority in the Supreme Court lent support, without elaboration, to the idea that inadmissible evidence could be considered in opposition to a summary judgment motion, creating yet another obscurity in the law of summary judgment.<sup>37</sup>

**B. The *Celotex II* Dissent**

Former Judge Bork argued in dissent that the trial court had properly granted summary judgment. In his view, Celotex had met its initial burden by pointing to a lack of evidence of exposure in the record. Further, he argued that the plaintiff's three documents could not properly be considered in opposition to the motion because they were not in admissible form.

(1) *Meeting the Moving Party's Initial Burden*

Judge Bork did not read Rule 56 as mandating any particular method of meeting the moving party's initial burden.<sup>38</sup> Rule 56(b), he pointed out, does not specifically require the use of affidavits.<sup>39</sup> The mov-

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32. "Since Celotex offered no evidence, we need not and do not speculate as to what showing would have been adequate to meet Celotex's burden." *Id.* at 185 n.13.

33. *Id.* at 185.

34. *See supra* note 17.

35. *Celotex II*, 756 F.2d at 186.

36. *Id.* *See infra* notes 113-23 and accompanying text, for the panel's views on this issue after remand from the Supreme Court.

37. *See infra* notes 90-92 and accompanying text.

38. *Celotex II*, 756 F.2d at 188.

39. *Id.* Rule 56(b) provides that a party against whom a claim is made may move for

ing party's obligation to show the absence of a material factual issue can be met without affirmative evidence:

[A] defendant seeking summary judgment need only convince the trial judge that a reasonable jury could not find for the plaintiff, even if all disputed issues of fact and inferences were resolved in the plaintiff's favor. There is no requirement that the trial judge must always become convinced of this by a positive evidentiary showing.<sup>40</sup>

To support his position, Judge Bork drew an analogy between summary judgment and directed verdict. Like a defendant seeking a directed verdict after a plaintiff's case at trial, Celotex only needed to persuade the trial court, based on the record before it, that the plaintiff's case was legally insufficient to sustain a verdict in her favor.<sup>41</sup> As he viewed the record in *Celotex I*, the plaintiff had made "no factual showing whatsoever" on the issue of exposure.<sup>42</sup>

Judge Bork also emphasized the importance of summary judgment to efficient judicial management. If the trial judge becomes aware of the absence of evidence to prove an essential element of a party's case, and the deficiency is "not corrected after notice, it becomes the trial judge's duty to grant summary judgment to conserve scarce judicial resources and avoid a useless trial."<sup>43</sup> The court's power to grant summary judgment *sua sponte* supported the view that summary judgment can be granted even when the moving party offers no "affirmative evidentiary proof."<sup>44</sup>

## (2) Using Inadmissible Evidence to Meet the Burden to Respond

What of the three documents which the plaintiff had pointed to in support of her claim of exposure? Judge Bork assumed that the plaintiff's documents were of no probative value on the issue of exposure because they were inadmissible: "[Plaintiff's attorneys] were certainly aware that the district judge could consider only admissible evidence in determining the existence of a triable, factual dispute."<sup>45</sup> Moreover, he

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summary judgment in his favor "with or without supporting affidavits." FED. R. CIV. P. 56(b).

40. *Celotex II*, 756 F.2d at 188.

41. *Id.* at 188-89.

42. *Id.* at 189 n.4.

43. *Id.* at 189.

44. *Id.*

45. *Id.* at 191 (citing 6 J. MOORE, MOORE'S FEDERAL PRACTICE 56-11[1-8] (2d ed. 1972) (judge can consider only admissible evidence in determining the existence of a triable issue of fact)). Judge Bork did not specify the admissibility problems. From the record, it is clear that the Hoff and O'Keefe letters are unauthenticated hearsay (the O'Keefe letter, moreover, merely summarizes what he was told by Hoff); and the Catrett deposition was taken in

criticized the majority's suggestion that, because some of the admissibility problems were curable,<sup>46</sup> the trial judge might properly have considered the plaintiff's evidence of exposure: "The majority's innovation on this point will substantially undermine the utility of summary judgment procedures while yielding no concomitant benefits."<sup>47</sup> In Judge Bork's view, since Mrs. Catrett had almost two years to prepare her case for trial and had not requested additional time to produce admissible evidence, as provided for by Rule 56(f), the trial judge had acted within his discretion in granting summary judgment.<sup>48</sup>

### III. The Supreme Court Opinions in *Celotex III*

*Celotex* petitioned for a writ of certiorari not only on the issue decided below—whether a moving party on summary judgment "must support its motion with some evidence even though the opposing party has no admissible evidence with which to support its claim"—but also on the issue discussed but not decided by the court of appeals—whether Rule 56 "permits a party to oppose a motion for summary judgment with inadmissible evidence."<sup>49</sup>

In *Celotex III*, the Supreme Court partially vindicated the views of both the majority and the dissent in *Celotex II*. It reversed the holding that *Celotex* had failed to meet its initial burden as the moving party and remanded the case for consideration of the evidentiary issues raised by the three documents relied on by the plaintiff.<sup>50</sup> Unfortunately, the majority opinion gave little guidance to future trial courts handling the ini-

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another proceeding in which *Celotex* was not represented and had no opportunity to cross-examine Mr. Catrett, who had since died. See *supra* note 17.

46. See *supra* text accompanying note 35.

47. *Celotex II*, 756 F.2d at 191 n.10.

48. *Id.* at 191. Rule 56(f) provides in relevant part:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court . . . may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

FED. R. CIV. P. 56(f).

49. Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at i, *Celotex III*, 477 U.S. 317 (1986) (No. 85-198).

50. *Celotex III*, 477 U.S. at 319. Justice Stevens, dissenting, would have affirmed the court of appeals' reversal of summary judgment on the grounds that defendant's motion had been based on plaintiff's failure to produce evidence of exposure "within the jurisdictional limits" of the District of Columbia. In his view, the trial judge's granting summary judgment on the basis of no showing of exposure in the District of Columbia "or elsewhere" was, thus, "palpably erroneous." *Celotex III*, 477 U.S. at 338-39.

tial burden issue, and even less guidance to the court of appeals for its consideration of the evidentiary issues on remand.

## A. Meeting the Moving Party's Initial Burden

### (1) *The Majority Opinion*

Justice Rehnquist, writing for a majority of five,<sup>51</sup> adopted Judge Bork's reasoning on the "showing" required to meet the moving party's initial burden on summary judgment. He found that there is no absolute requirement that the moving party support its motion with affidavits: "On the contrary, Rule 56(c), which refers to 'the affidavits, *if any*' . . . suggests the absence of such a requirement."<sup>52</sup> Thus, in a case where the nonmoving party will bear the burden of proof at trial, the moving party can discharge its initial burden, as Celotex had attempted to do here, simply by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."<sup>53</sup> Celotex need not prove a negative (nonexposure to its products), but could properly ground its motion on the lack of evidence establishing exposure.<sup>54</sup>

Although Justice Rehnquist's reading of Rule 56(c) does no violence to the words of the rule itself, it goes against a long-accepted interpretation of the rule that the Court first announced in *Adickes v. S. H. Kress & Co.*<sup>55</sup> In the District of Columbia and elsewhere, *Adickes* had been inter-

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51. Justice Rehnquist's opinion is technically a majority rather than a plurality opinion due to Justice White's separate concurrence "in the opinion and judgment of the Court." *Id.* at 318. As Justice Brennan pointed out, however, Justice White and Justice Rehnquist clearly had different views about the task facing the court of appeals on remand. *Id.* at 329 n.1.

52. *Id.* at 323 (emphasis added by the Court).

53. *Id.* at 325. The *Celotex II* majority, in reversing summary judgment, noted that "Celotex did not simply fail to submit affidavits . . . in support of its motion; it came forward literally with nothing *save for pointing to perceived shortfalls* in the plaintiff's case." *Celotex II*, 756 F.2d 181, 185 n.12 (D.C. Cir. 1985) (emphasis added).

54. "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex III*, 477 U.S. at 322. The Court indicated that a different result might be called for if the motion was made before much discovery had taken place. In such a case a continuance under Rule 56(f) to allow further discovery would be appropriate. *Id.* at 326.

55. 398 U.S. 144 (1970). In *Adickes* the plaintiff, a white teacher, alleged a conspiracy between defendant Kress and the local police to deny her service at the lunch counter in its Hattiesburg, Mississippi, store because she was in the company of blacks. Kress brought a motion for summary judgment supported by affidavits of the store manager and the police denying any conspiracy and by Ms. Adickes' admission that she had no direct evidence of the alleged conspiracy. Despite the fact that the plaintiff would have the burden of proving the existence of a conspiracy at trial, the Court ruled that Kress had failed to meet its initial

preted as holding that the moving party on a summary judgment motion must *negate* the nonmoving party's claim in order to meet its initial burden under Rule 56.<sup>56</sup> Justice Rehnquist completely ignored the language from *Adickes* on which that interpretation was based.<sup>57</sup> Instead, he focused on the *Adickes* Court's comments about Rule 56(e) and the burden on the nonmoving party to respond once the moving party has met its initial burden.<sup>58</sup> Only by ignoring the relevant language was he able to state that *Adickes* should *not* "be construed to mean that the burden is on

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burden on summary judgment because its supporting papers did not "foreclose the possibility" that there was a policeman in the store when plaintiff was refused service. *Id.* at 157. If a policeman was in the store, the Court reasoned, a jury might reasonably find that a conspiracy arose after plaintiff entered. *Id.* at 158. Kress had, therefore, left open a genuine issue of material fact. *Id.* at 159.

56. See, e.g., *Board of Education v. Pico*, 457 U.S. 853, 875 (1982) (reversal of summary judgment affirmed: "The evidence plainly does not foreclose the possibility that [the moving party's] decision to remove the books" was unconstitutionally motivated); *United States v. One (1) 1944 Steel Hull Freighter*, 697 F.2d 1030, 1031 (11th Cir. 1983) ("The issue in this case is whether, in a summary judgment action, the burden of proving common carrier status rests on the [nonmoving party], as it would in a trial. . . . [The moving party] presented no evidence to show that [the nonmoving party] was *not* a common carrier. Given this failure . . . summary judgment should not have been granted because . . . the moving party has the burden of showing that there is no genuine issue of material fact.") (emphasis added); *Smith v. Hudson*, 600 F.2d 60, 64 (6th Cir. 1979) (citing *Adickes*) ("A party is never required to respond to a motion for summary judgment in order to prevail since the burden of establishing the nonexistence of a material factual dispute always rests with the movant), *cert. dismissed*, 444 U.S. 986 (1979); *Rose v. Bridgeport Brass Co.*, 487 F.2d 804, 808 (7th Cir.1973) (quoting *Albert Dickinson Co. v. Mellos Peanut Co.*, 179 F.2d 265, 268 (7th Cir. 1950)) ("On a motion for a summary judgment the burden of establishing the non-existence of any genuine issue of [material] fact is upon the moving party . . . "); see also cases cited in *Celotex II*, 756 F.2d at 185 n.11.

57. "[U]nlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the [nonmoving party's] claim." *Celotex III*, 477 U.S. at 323 (emphasis in original). The majority noted that the Fifth Circuit had recently rejected the position taken by the District of Columbia Circuit. *Id.* at 319 n.1; see *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986) ("If . . . the party seeking summary judgment against one who bears the proof burden has no access to evidence of disproof, and ample time has been allowed for discovery, he should be permitted . . . to rely upon the complete absence of proof of an essential element of the [nonmoving] party's case"). The Court in *Adickes*, however, clearly put the onus on the moving party to produce affirmative evidence of the nonmoving party's inability to establish an essential element of her case. Even though *Adickes* would have had the burden of proof at trial regarding the existence of a conspiracy, the Court reversed summary judgment in favor of Kress, noting that "Kress did not carry its [initial] burden because of *its failure to foreclose the possibility* that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some Kress employee that petitioner not be served." *Adickes*, 398 U.S. at 157 (emphasis added). Kress "failed to fulfill its initial burden of demonstrating what is a critical element in this aspect of the case—that there was no policeman in the store." *Id.* at 158 (emphasis added). Kress's "failure to show that there was no policeman in the store requires reversal." *Id.* at 159 (emphasis added).

58. *Celotex III*, 477 U.S. at 325.

the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof.”<sup>59</sup>

The *Celotex III* decision marks a substantial break with precedent regarding the initial burden on a party moving for summary judgment.<sup>60</sup> No longer required to “foreclose the possibility”<sup>61</sup> that the opponent can prove some element of its case, the moving party, like a defendant seeking a directed verdict at trial, need only point to the absence of evidence in the record establishing an essential element on which the nonmoving party will have the burden of proof at trial.<sup>62</sup>

(2) *The Moving Party's Initial Burden and the Role of Discovery*

In redefining the moving party's initial burden on summary judgment, the *Celotex III* majority did not spell out the preconditions for an “absence of evidence” summary judgment motion. Having stated that the standard for granting summary judgment mirrors that for granting a directed verdict, the majority failed to address the practical differences created by the fact that summary judgment, unlike directed verdict, is sought before the nonmoving party has attempted a full presentation of its case. For example, may a party forego discovery or undertake very limited discovery and then move for summary judgment on the grounds that there is nothing in the record to support some essential element of the nonmoving party's case? If not, how much effort must the moving party make to discover the nonmoving party's case before shifting the burden of production on summary judgment? The majority opinion in *Celotex III* offers no guidelines, except to indicate that a motion based on the absence of evidence in the record to support the nonmoving party's

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59. *Id.*

60. Despite Justice Rehnquist's statement that “on the basis of the showing before the Court in *Adickes*, the motion for summary judgment in that case should have been denied,” the results in the two cases cannot be squared in terms of the initial burden placed on the moving party. *Id.* at 325; see *supra* text accompanying note 57. They can be reconciled only by moving beyond the initial burden question (which the court in *Adickes* explicitly refused to do) to consider the effect of the evidence of exposure in the record when *Celotex* made its second summary judgment motion. See *infra* note 110. As my colleague Mary Kay Kane pointed out, one must also take into account the context in which the two cases were decided—*Adickes* at a time when civil rights suits were encouraged and *Celotex III* at a time when docket pressure was intense—to understand fully the shifts in the Court's approach to summary judgment.

61. *Adickes*, 398 U.S. at 157.

62. The majority quoted *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), decided the same day as *Celotex III*, for the proposition that the standard for granting summary judgment “‘mirrors’” that for granting a directed verdict at trial. *Celotex III*, 477 U.S. at 323.

case should be decided only after "adequate time for discovery."<sup>63</sup> This caveat overlooks the fact that it is only the party moving for summary judgment who has any incentive to create record evidence of the non-moving party's case through discovery. When the nonmoving party will bear the burden of proof at trial, she has no reason to reveal her own evidence voluntarily.<sup>64</sup>

If defendants seek to avoid the delay and expense of trial, at a minimum they must shoulder the expense of doing sufficient discovery to show that the plaintiff does not have a case. Discovery is as integral a part of the Federal Rules as summary judgment. There is little merit in an interpretation of summary judgment procedure that would encourage parties not to use the discovery rules, in hopes of then invoking summary judgment to force an opponent to reveal his case. Unfortunately, this point does not emerge clearly from the majority opinion in *Celotex III*. The focus should not be merely on the elapsed time available for discovery but, more importantly, on the discovery efforts actually made by a moving party before seeking summary judgment on the ground that the record is devoid of evidence to establish an essential element of the non-moving party's case.<sup>65</sup>

The majority, in its haste to ease the initial burden on a moving party who will not have the burden of proof at trial, also misread the record as to when *Celotex* became aware of the three documents relied on by the plaintiff.<sup>66</sup> This makes its opinion of little prospective use in determining what will constitute a sufficient showing to meet the moving party's initial burden. The majority referred to the three documents as having been filed "[i]n response to" *Celotex's* summary judgment motion, which was "first filed in September 1981," thus treating them as if they were introduced in response to the motion for summary judgment which was the subject of the appeal.<sup>67</sup> As a result, the Court's decision

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63. *Celotex III*, 477 U.S. at 322.

64. In the words of Justice White:

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case.

*Id.* at 328 (White, J., concurring).

65. A similar point is implicit in the standard formulated by Professor Louis, when he suggested that the moving party can meet his initial burden only when his supporting materials, "from which there are no glaring omissions of evidence to which he has apparent access," show that he is entitled to it. Louis, *supra* note 8, at 758.

66. See *supra* note 17.

67. *Celotex III*, 477 U.S. at 319-20.



rested on the invalid premise that the record was devoid of evidence of exposure at the time the motion appealed from was made. In fact, the plaintiff's documents were already part of the record when Celotex brought its second summary judgment motion in December 1981.<sup>68</sup> For example, Celotex knew or should have known that Hoff was a potential witness on the issue of exposure after the plaintiff filed Hoff's letter with her response to Celotex's first summary judgment motion.<sup>69</sup> Yet, Celotex made no effort to depose Hoff before renewing its motion in December. On the record before it, the Court should have reversed the grant of summary judgment. Even under the newly announced standards, Celotex failed to meet the moving party's initial burden by ignoring evidence of exposure which was in the record when its second motion was made.

### (3) *Other Justices' Views on the Moving Party's Initial Burden*

In contrast to the majority, both Justice White, concurring, and Justice Brennan, dissenting,<sup>70</sup> suggested guidelines for determining when a moving party has met its initial burden by pointing to the absence of record evidence supporting the nonmoving party's case.<sup>71</sup> Justice White, whose concurrence provided the necessary fifth vote to create a majority, emphasized that the initial burden on the moving party had not been effectively abolished by the Court's ruling: "It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case. . . . It is the defendant's task to negate, if he can, the claimed basis for the suit."<sup>72</sup> To illustrate this point, Justice White noted that Celotex had agreed at oral argument that if Mrs. Catrett had named a witness on the issue of exposure, "summary judgment should not be granted without Celotex somehow showing that the named witness' possible testi-

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68. See *supra* note 17.

69. Hoff's letter stated that Louis Catrett had worked for Anning & Johnson Co. between December 1970 and December 1971, and that during his employment he supervised the application of an asbestos product manufactured by a company later purchased by Celotex. Plaintiff's Joint Appendix, *supra* note 17, at 162-63. His testimony on these points would thus support the plaintiff's claim of exposure. Indeed, the majority in *Celotex III* itself recognized that plaintiff's documents "tend[] to establish that [Mr. Catrett] had been exposed to [Celotex'] asbestos products in Chicago during 1970-71." *Celotex III*, 477 U.S. at 320.

70. Former Chief Justice Burger and Justice Blackmun joined in Justice Brennan's dissent.

71. Justice Stevens did not reach the initial burden issue. See *supra* note 50. He called the Court's discussion of it an "abstract exercise in Rule construction." *Celotex III*, 477 U.S. at 339 (Stevens, J., dissenting).

72. *Id.* at 328.

mony raises no genuine issue of material fact.”<sup>73</sup>

In his dissent, Justice Brennan wrote at length on the initial burden issue. He disagreed with the result reached by the majority but not with its general analysis of summary judgment law. He thought, however, that the majority had “not clearly explained” its reasoning and that its opinion would “very likely create confusion” in the district courts.<sup>74</sup> Like Justice White, Justice Brennan emphasized that the initial burden in an “absence of evidence” case is not an illusory one: “Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. . . . Such a ‘burden’ of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment.”<sup>75</sup> He read the majority opinion as also requiring an affirmative showing that such evidence is absent.<sup>76</sup> He added, however, an important clarification which was not spelled out by the majority: this affirmative duty may require the moving party “to depose the nonmoving party’s witnesses or to establish the inadequacy of documentary evidence.”<sup>77</sup> Following Justice Brennan’s standard, the action the moving party must take to meet the initial burden will depend on the state of the record when the motion is made. Only if there is “literally no evidence”<sup>78</sup> to support an essential element of the nonmoving party’s case will the moving party be able to meet the initial burden simply by pointing to the record.

Thus, both Justice White and Justice Brennan made clear that the party seeking to rely on the absence of record evidence as a basis for summary judgment has an obligation to pursue leads obtained in discovery. Any other rule would vitiate the incentive to do thorough discovery before moving for summary judgment and would encourage the use of summary judgment to harass the nonmoving party or to force him to disclose his case prematurely.

When moving for summary judgment, a party asserting the absence of evidence to support the nonmoving party’s case should be required to show that reasonable efforts have been made to uncover the relevant evi-

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73. *Id.* He concurred with the decision to remand, however, because “the Court of Appeals found it unnecessary to address this aspect of the case.” *Id.* at 328-29.

74. *Id.* at 329. He also questioned the decision to reverse rather than to vacate the decision in the court of appeals, on the grounds that Justice White “plainly believes that the Court of Appeals should reevaluate whether the defendant met its initial burden of production,” and that Justice White’s view should be controlling, since he provided the necessary fifth vote for the majority. *Id.* at 329 n.1.

75. *Id.* at 332.

76. *Id.* (citing the majority opinion at 323).

77. *Id.*

78. *Id.*

dence, through use of interrogatories, document requests, depositions, and requests for admission. While such a threshold showing is consistent with the majority opinion in *Celotex III*,<sup>79</sup> this requirement needs to be made explicit. Unfortunately, Justice Rehnquist's discussion of the relationship between discovery and summary judgment focused exclusively on what the nonmoving party must do to defeat the motion and did not sufficiently address the moving party's threshold responsibilities.<sup>80</sup>

Despite his agreement with the majority's general approach to the initial burden issue, Justice Brennan disagreed with the result they reached on the facts. His disagreement highlights the need for the trial court to conduct a careful analysis of the record before ruling on a motion for summary judgment based on a claim that the nonmoving party lacks legally sufficient evidence of an essential element on which it will have the burden of proof at trial. Having read the record in *Celotex III* more carefully than some of the other Justices, Justice Brennan noted that the three documents on which Mrs. Catrett relied in opposing summary judgment were *in the record* at the time *Celotex* made its second motion.<sup>81</sup> Thus, in his view, *Celotex* could not meet its initial burden of production by simply pointing to the absence of evidence of exposure in the record because the record clearly contained evidence of the alleged exposure. In order to meet the initial burden on its second motion *Celotex* "was required, as an initial matter, to attack the adequacy of this evidence."<sup>82</sup> Since it had made no effort to do so, Justice Brennan concluded, summary judgment was improper.<sup>83</sup>

## B. The Nonmoving Party's Burden to Respond

Until this point, the discussion of the *Celotex III* opinions has considered only the issue of what is sufficient to meet the moving party's initial burden and thus to compel the opponent to respond to the summary judgment motion. That issue, however, was intimately bound up in *Celotex III* with the issue of the sufficiency of the nonmoving party's response. Indeed, as discussed above, an unusual aspect of *Celotex III* is

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79. The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions [of the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323.

80. See *supra* text accompanying note 59.

81. *Celotex III*, 477 U.S. at 336.

82. *Id.* Justice White (and the lawyers for *Celotex*) appeared to agree with this argument, at least in principle. See *supra* notes 72-73 and accompanying text.

83. *Celotex III*, 477 U.S. at 336. Justice Brennan called the situation "indistinguishable" from *Adickes*, where the Court held that the nonmoving party had no obligation to come forward under Rule 56(e) *until and unless* the movant had met its initial burden of production. *Id.* at 337.

that the majority and dissent disagreed on the elementary factual question of what was actually in the record when the defendants made the summary judgment motion from which they later appealed.

Mrs. Catrett contended that she had no obligation to respond to the motion because Celotex failed to meet its initial burden. Moreover, she maintained that even if Celotex had met its initial burden, she had made a sufficient showing in response to defeat the motion. In return, Celotex argued that the evidence submitted by Mrs. Catrett—the Hoff and O’Keefe letters and the Catrett deposition—was inadmissible hearsay and thus could not be considered in ruling on the motion.<sup>84</sup>

As discussed above,<sup>85</sup> Judge Bork shared Celotex’s view. He considered it a “departure from the established rules” to suggest “that the district judge could consider inadmissible evidence of causation because the admissibility problems with the evidence might eventually be cured.”<sup>86</sup> Judge Bork’s view is also consistent with the Supreme Court’s statements on the subject in *Adickes*<sup>87</sup> and the generally accepted view in the lower courts.<sup>88</sup>

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84. *Id.* at 320.

85. *See supra* notes 45-48 and accompanying text.

86. *Celotex II*, 756 F.2d 181, 191 n.10 (D.C. Cir. 1985).

87. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). *See supra* note 55. The Court in *Adickes* clearly thought there was *no* admissible evidence to support plaintiff’s claim and would have affirmed the granting of summary judgment but for the finding that Kress had not met its initial burden. In discussing the evidence that a policeman was in the store, it noted that *Adickes*’ “statement at her deposition . . . was, of course, hearsay; and the statement of [Kress’s employee] Miss Sullivan . . . was unsworn.” *Adickes*, 398 U.S. at 159 n.19. It went on to say, “If [Kress] had met its initial burden, . . . [Adickes] would have had to come forward with either (1) the *affidavit* of someone who saw the policeman in the store or (2) an affidavit under Rule 56(f) explaining why at that time it was impractical to do so.” *Id.* at 160 (emphasis added). *See also* *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 263 (1986) (Brennan, J., dissenting) (In *Adickes* the Court “never reached and did not consider whether the evidence was ‘one-sided,’ and had we done so, we clearly would have had to affirm, rather than reverse, the lower courts, since in that case there was no admissible evidence submitted by [Adickes], and a significant amount of evidence presented by [Kress] tending to rebut the existence of a conspiracy.”).

88. *See, e.g., Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1139 (E.D. Pa. 1980) (“In determining admissibility under Rule 56, the same standards apply as at trial. Thus, in ruling upon summary judgment motions, courts refuse to consider hearsay; unauthenticated documents; inadmissible expert testimony; documents without a proper foundation; parol evidence; and even evidence barred by the dead man’s rule”) (citations omitted), *modified*, 723 F.2d 238 (3d Cir. 1984), *rev’d*, 475 U.S. 574 (1986); 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 2727, at 156 (“Rule 56(e) requires the [nonmoving party] to set forth facts that would be admissible in evidence at trial.”).

The simplest explanation for such a rule—applicable to both parties—is that summary judgment is a substitute for trial; and evidence that would be inadmissible at trial is of no use in discerning whether there is any factual dispute for the trier of fact to resolve. On the other hand, since the motion is heard in advance of trial, all evidence “must be viewed in the light

The majority in *Celotex II*, however, took a different position on the admissibility question. Judges Starr and Wald indicated that while Mrs. Catrett's evidence of her husband's exposure was inadmissible, some of the evidentiary problems were "curable", implying that some of the evidence should have been considered in opposition to summary judgment.<sup>89</sup> Without citing authority or discussing the issue, the majority in *Celotex III* lent support to that view. In his majority opinion, Justice Rehnquist found that Rule 56(e) permits the nonmoving party to oppose summary judgment with any of the materials listed in Rule 56(c), other than the pleadings.<sup>90</sup> He qualified his textbook assertion of what a judge can consider by saying that "it is from this list that one would *normally* expect the nonmoving party to make the [necessary] showing . . . ."<sup>91</sup> The required showing, however, "do[es] not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment."<sup>92</sup> Thus, without further explanation, he opened the door to evidence that was not already reduced to admissible form, but merely was reducible to such form before the time of trial.

This novel approach to the admissibility of evidence used to oppose summary judgment is difficult to explain except as a byproduct of the confused reasoning that led to the majority's factually incorrect conclusion on the initial burden question. By misreading the state of the record

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most favorable" to the nonmoving party. *Adickes*, 398 U.S. at 157. Even when the moving party has met its initial burden and the nonmoving party has failed to respond, summary judgment is to be granted only "if appropriate." FED. R. CIV. P. 56(e). See *Celotex III*, 477 U.S. at 330 n.2, for Justice Brennan's discussion of the moving party's burden of proof.

89. *Celotex II*, 756 F.2d at 186. The court did not give any examples of how the deficiencies might be cured in its original opinion, but it did come up with some theories on the subject on remand from the Supreme Court. See *infra* notes 113-18 and accompanying text.

90. *Celotex III*, 477 U.S. at 323.

91. *Id.* at 324 (emphasis added).

92. *Id.* In distinguishing two questions for the court of appeals on remand—the "adequacy" of Mrs. Catrett's showing and its "sufficien[cy]," "if reduced to admissible evidence," to carry her burden of proof at trial—Justice Rehnquist implicitly reiterated the view that inadmissible evidence may be used to oppose summary judgment, as long as it is reducible to admissible evidence at trial. *Id.* at 327 (emphasis added). Accordingly, Hoff's letter, although unauthenticated hearsay, could be considered in opposition to summary judgment, since Hoff was apparently available and competent to testify at trial about Louis Catrett's exposure to asbestos (or, at least, to authenticate the business records on which his letter was based). On the other hand, the Catrett deposition could not be considered in opposition to summary judgment. It was not reducible to admissible evidence at trial because *Celotex* did not have an opportunity to cross-examine Mr. Catrett at the deposition and he had since died. Once the adequacy of the nonmoving party's showing is thus determined, its sufficiency—under the new *Anderson* directed verdict standard—must be decided. See *supra* notes 8 & 62 and accompanying text.

when Celotex's second summary judgment motion was made, the majority took it to be devoid of any evidence of exposure, thus leaving Mrs. Catrett vulnerable to an "absence of evidence" motion. By traditional reasoning, that would have ended her case because she could not have successfully opposed the motion with inadmissible evidence. Justice Rehnquist's unprecedented and unsupported pronouncement that inadmissible evidence may be considered in opposition to summary judgment saved the issues of adequacy and sufficiency of the plaintiff's evidence for further consideration on remand.<sup>93</sup> He thus introduced a new ambiguity into the summary judgment calculus which is difficult to square with the text of Rule 56.

#### IV. Procedural Admissibility Under Rule 56 and the Use of Inadmissible Evidence

In this Article "procedural admissibility" of evidence refers to compliance with the standards set forth in Rule 56 for evidence properly considered by a trial court in deciding a summary judgment motion. The standards emphasize that the evidence considered must be highly reliable. All materials specifically permitted by Rule 56(c), other than pleadings, are either potentially admissible at trial under the Rules of Evidence (for example, answers to interrogatories and requests for admissions) or are sworn and readily convertible to admissible evidence (for example, affidavits and depositions).<sup>94</sup>

##### A. Reasons for Requiring Procedural Admissibility

Although an affiant may die or testify differently at trial, as a general rule, a sworn statement is a reliable forecast of the evidence that will be

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93. Justice Stevens, dissenting, appeared to accept the majority's view on admissibility: Mrs. Catrett made "an adequate showing—albeit possibly not in admissible form—" of exposure. *Celotex III*, 477 U.S. at 338. Justice White, concurring, did not address the admissibility issue. Justice Brennan also did not reach the admissibility issue, but his dissenting opinion in *Anderson* indicates that he does not think that inadmissible evidence can be used to oppose a summary judgment motion once the moving party has met its initial burden. See *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 263 (1986); *supra* note 87.

94. In addition, only those portions of affidavits and depositions which are relevant, based on personal knowledge, and would otherwise be admissible at trial may be considered by the trial court in deciding a summary judgment motion. 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 2722, at 48-50 ("Only that portion of a deposition that would be admissible in evidence at trial may be introduced on a summary judgment motion . . ."); *id.* § 2738, at 474 ("Because the policy of Rule 56(e) is that the judge should consider any material that would be admissible at trial, the rules of evidence and the exceptions thereto determine what averments the affidavit may contain.").

presented at trial.<sup>95</sup> Furthermore, by specifically providing for a particular form of sworn *ex parte* testimony, the Rule in effect excludes the use of unsworn statements and defective affidavits.<sup>96</sup> While courts do not consider the list in Rule 56(c) as exclusive—documents, for example, are routinely considered on summary judgment<sup>97</sup>—the basic standard is admissibility at trial, with the exceptions provided for in Rule 56(c).

Although some cases prior to *Celotex III* had suggested that more lenient standards applied to the evidence presented by the nonmoving party, that view has had limited acceptance and is not supported by the language of the rule.<sup>98</sup> The change suggested by the majority's language in *Celotex III* is a makeshift solution to a problem of the majority's own creation. Adopting it will undermine the reliability Rule 56 affords and make the judge's task in deciding summary judgment motions more difficult by encouraging the submission of unsworn and unauthenticated materials. It will also increase the likelihood of denying summary judgment in cases where the nonmoving party will ultimately lose at trial for lack of admissible evidence to prove its case.

The absence of discussion and citation of authority indicates that the Court did not thoroughly consider the admissibility issue.<sup>99</sup> It is particu-

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95. If not, the sworn statements can always be used for purposes of impeachment or as substantive evidence at trial. FED. R. EVID. 607, 801(d)(1), 801(d)(2).

96. "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." FED. R. CIV. P. 56(e); see 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 2738, at 465-510.

97. Documents to be considered are routinely required to be authenticated and brought within some hearsay exception through competent affidavit or deposition testimony. 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 2722 and cases cited at 58-60.

98. *Id.* § 2738, at 484-86 ("The cases seem to indicate that judges . . . will treat the papers of the party opposing the motion indulgently. . . . Inasmuch as Rule 56(e) itself does not draw a qualitative distinction between the papers submitted by the moving party and those of the opposing party, the latter would be wise not to rely upon the differential treatment suggested by some of the cases if he can avoid doing so."); see *supra* note 88. The current trend in summary judgment law suggests that courts will no longer be quite so solicitous of the nonmoving party. In addition, as Justice Brennan pointed out in his dissent in *Celotex III*, the burden of proof on a moving party is a "stringent one." *Celotex III*, 477 U.S. 317, 330 n.2 (1986). The nonmoving party is further protected by the availability of a continuance under Rule 56(f) to gather opposition materials in proper form. See, e.g., *Barker v. Norman*, 651 F.2d 1107, 1128-29 (5th Cir. 1981) (indicating that it may be an abuse of discretion for the trial judge to deny an opportunity to remedy defects in summary judgment materials). The rule does *not* say that the nonmoving party can meet its burden to respond with less reliable evidence than is required of the moving party in meeting its initial burden.

99. The majority in the court of appeals in *Celotex II* also suggested that Rule 56's limitations on procedural admissibility need not be rigidly applied, at least where it appeared that the evidentiary defect would be curable before trial. *Celotex II*, 756 F.2d 181, 185-86 (D.C. Cir. 1985); see *supra* text accompanying note 35. The point, however, was of little immediate consequence there, because the majority found that the plaintiff had no obligation to come

larly significant, however, because of the majority's holding that the defendants had met their initial burden by pointing to the absence in the record of any evidence of exposure. Accepting for the moment the majority's assumption that Mrs. Catrett's documents were not in the record when Celotex made its motion, the outcome on remand would depend on the question of procedural admissibility.<sup>100</sup> Under the traditional approach, the plaintiff's three documents would be excluded as hearsay, and the defendants would prevail.<sup>101</sup> Judge Bork urged this outcome in *Celotex II*,<sup>102</sup> and it is consistent with the Supreme Court's implicit views on the subject in *Adickes*.<sup>103</sup> If the majority's statements in *Celotex III* on procedural admissibility are accepted, however, the result is different. Despite their hearsay nature, the nonmoving party's documents could be considered in opposition to the moving party's motion. Then the issue becomes whether the evidence contained in the documents, if reduced to admissible form at trial, would be sufficient to withstand a directed verdict motion.<sup>104</sup>

#### B. Policy Concerns Regarding Procedural Admissibility

The policy concern behind Justice Rehnquist's statements on procedural admissibility is to avoid entering judgment against a party who can present a factual dispute for trial. The problem the *Celotex III* majority "solved," by ill-advised pronouncements on the adequacy of procedurally inadmissible evidence, could have been avoided if it had not been so eager to use the case as a vehicle for announcing its new "absence of evidence" standard for meeting the moving party's initial burden. If the majority had recognized that the plaintiff's three documents were already part of the record when Celotex made its second summary judgment motion, then the Court should have affirmed the court of appeals' holding that the moving party had failed to meet its initial burden.<sup>105</sup>

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forward with *any* evidence, since the defendant had failed to meet its initial burden of production. *Celotex II*, 756 F.2d at 184.

100. Unless, of course, the court of appeals followed Justice Brennan's suggestion that, due to the language in Justice White's concurrence, the question of whether Celotex had met its initial burden should be reconsidered on remand. *Celotex III*, 477 U.S. at 329 n.1.

101. They would prevail, having met their initial burden, because the plaintiff's lack of admissible evidence to oppose the motion would be equivalent to a failure to respond (unless the court concluded that summary judgment was not "appropriate" for some other reason, as provided by Rule 56(e)).

102. See *supra* notes 45-48 and accompanying text.

103. See *supra* note 87.

104. On remand, the court of appeals used the Supreme Court's flexible position on procedural admissibility to save Mrs. Catrett's case for trial. *Celotex IV*, 826 F.2d 33 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1028 (1988); see *infra* notes 112-18 and accompanying text.

105. This was Justice Brennan's primary point of disagreement with the majority, and the



The majority's position on the admissibility issue is wrong. If evidence that is merely "reducible" to admissible form at trial is considered in opposition to summary judgment, then the usefulness of summary judgment as a method for disposing of factually insufficient cases will be severely limited.<sup>106</sup> "Reducible" evidence produced in the course of discovery, however, is sufficient to oblige a party to do further discovery before moving for summary judgment on the grounds approved in *Celotex III*.

For example, consider the Hoff letter. If Mrs. Catrett had produced it in response to a document request or, as was the case, as an attachment to papers filed in response to a motion that was later withdrawn, Celotex should have been required to depose Hoff before seeking summary judgment on the grounds that there was no evidence of exposure in the record.<sup>107</sup> Indeed, even a hearsay statement by another witness, such as O'Keefe, that Hoff had said that Mr. Catrett was exposed to asbestos should be enough to require further discovery before seeking summary judgment on that issue. On the other hand, if Celotex had done thorough discovery on the exposure issue and Mrs. Catrett had failed to produce any evidence of exposure, then she should not be able to avoid summary judgment merely by producing the Hoff letter in opposition to the motion.<sup>108</sup> At that point, allowing inadmissible evidence to defeat a

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reason for his dissenting vote: "Thus, if the record disclosed that the moving party had overlooked a witness who would provide relevant testimony . . . at trial, the Court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of the witness' testimony." *Celotex III*, 477 U.S. 317, 332-33 (1986) (Brennan, J., dissenting).

106. This move away from a trial standard of admissibility also works at cross-purposes with the Court's clear intent to encourage increased use of summary judgment by easing the standards for meeting the moving party's initial burden when the nonmoving party will have the burden of proof at trial, *Celotex III*, 477 U.S. at 323-24; by adopting the directed verdict standard for evaluating the nonmoving party's evidence in opposition to summary judgment when the nonmoving party will have the burden of proof at trial, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); and by exhortation:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole. . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses, . . . but also for the rights of persons opposing such claims and defenses to demonstrate . . . prior to trial, that the claims and defenses have no factual basis.

*Celotex III*, 477 U.S. at 327.

107. See *supra* note 69 and accompanying text.

108. Thus, assuming adequate discovery had been done before Celotex made its first summary judgment motion in September 1981, the trial court could properly have ignored the Hoff letter in deciding the first motion because it was not in admissible form. After the first motion was withdrawn, however, leaving the Hoff letter in the record, Celotex could no longer point to an absence of evidence of exposure in the record. It then had to "demonstrate the inade-

properly supported summary judgment motion would increase the uncertainty of the procedure and increase the likelihood that a denial of summary judgment would be followed by a failure of proof at trial. If Mrs. Catrett had acquired the letter before discovery began, she should have produced it or referred to its contents in response to an appropriate discovery request. Alternatively, if she had only recently become aware of its (and Hoff's) existence, then she should have made a motion under Rule 56(f) for a continuance to allow her to put the evidence into procedurally admissible form.<sup>109</sup>

Inventing a new rule of procedural admissibility that goes against the express language of Rule 56 was not the most satisfactory solution to the dilemma faced by the majority in *Celotex III*—how to avoid granting summary judgment when it appears that the nonmoving party has a case, although it is not established by procedurally admissible evidence. Rather, careful application of the initial burden standard outlined in the opinions of Justices Brennan and White would have resolved the problem. This standard requires the moving party to pursue adequate discovery on the essential elements of the nonmoving party's case in order to meet its initial burden.<sup>110</sup> As a result, the nonmoving party will not be forced to produce affidavits or depositions of friendly witnesses in response to a motion that incorrectly asserts a lack of record evidence to establish the nonmoving party's case.<sup>111</sup> When appropriate, the nonmov-

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quacy" of Hoff's evidence in order to meet the initial burden on its second summary judgment motion in December 1981. *Celotex III*, 477 U.S. at 332 (Brennan, J., dissenting).

109. The decision in *Adickes* is completely consistent with this approach. In that case, plaintiff's hearsay deposition statement that one of her students had seen a policeman in the store would not be procedurally admissible in opposition to Kress's summary judgment motion, but it would preclude Kress from relying on absence of evidence in the record as the basis for its motion until and unless it took the student's deposition and could show some fatal defect in her testimony. See *supra* note 87. Justice Brennan's opinion that *Celotex III* is "indistinguishable" from *Adickes* overlooks the fact that the reasoning which led to reversal in *Adickes* (relating to the moving party's obligation to negate the elements of the nonmoving party's case) was quite different from that espoused by him in *Celotex III*. Applying his argument, and mine, however, on the proper standards for meeting the moving party's initial burden to the facts in *Adickes* does lead to the same result.

110. This will not mean that the considerable expense of deposing witnesses must be undertaken in every case before summary judgment can be sought. For example, if answers to interrogatories fail to name any witnesses in support of an essential element of the opponents' case—after ample time for discovery—then an "absence of evidence" motion would be proper. On the other hand, questions of balancing the value of discovery and that of summary judgment in the overall scheme of the Rules will still arise. For example, if the response to an interrogatory lists ten witnesses and the first three deposed fail to provide the indicated support for the plaintiffs case, the trial court might find that an "absence of evidence" motion was proper even though the remaining witnesses had not been deposed.

111. Justice Rehnquist's comments about using inadmissible evidence apparently were prompted by just this sort of concern: "[o]bviously, Rule 56 does not require the nonmoving

ing party can make a Rule 56(f) motion seeking additional time to put necessary evidence into procedurally admissible form.

### V. The Lower Courts Respond to *Celotex III*

In response to the redefinition of the moving party's initial burden on summary judgment, lower courts have recognized that such motions may proceed when the moving party has merely highlighted the absence of record evidence to support an essential element of the nonmoving party's case.<sup>112</sup> Accordingly, summary judgment is more readily available now than it was before the *Celotex III* decision.

On the other hand, the new-found license to consider procedurally inadmissible evidence on summary judgment seems to have largely escaped notice, even though the result in *Celotex III* depended on it. Among the courts that have discussed the subject, responses have ranged from incredulity that such a major change could have been intended to docile acceptance of a new standard.

After the case was remanded by the Supreme Court, the *Celotex IV* panel of the District of Columbia Circuit walked a fine line on the admissibility issue.<sup>113</sup> The court decided the case by a two to one margin, with former Judge Bork dissenting again from the opinion of Judges Starr and Wald. The majority first concluded that the Hoff letter<sup>114</sup> was arguably admissible as a business record<sup>115</sup> and that it could be considered in opposition to the summary judgment motion, especially since "Celotex

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party to depose her own witnesses." *Celotex III*, 477 U.S. at 324; *accord, id.* at 328 (White, J., concurring).

112. See *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 217 (4th Cir. 1987) (Rule 12(b)(6) dismissal treated as summary judgment, proper under *Celotex III* after movant pointed out deficiencies in opponent's case); *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977, 980 (9th Cir. 1987) (citing *Celotex III*) ("The [moving party] was not required to 'support its motion with affidavits or other similar materials negating the [nonmoving party's] claim'") (emphasis in original). The Fifth Circuit, which paved the way for *Celotex III* in *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir. 1986), has equivocated with respect to the new standard. Compare *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987) (citing FED. R. CIV. R. 56(e) and *Celotex III*) ("Once the moving party makes the initial showing, *negating* any disputed, material fact, the [nonmoving party] must offer evidence reflecting the existence of one or more genuine issues of material fact.") (emphasis added) with *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987) (citing *Celotex III* and *Fontenot*) ("as to issues on which [the nonmoving party] would bear the burden of proof, the movant may obtain summary judgment by pointing to [the nonmoving party's] failure to produce evidence."). See generally *Federal Summary Judgment*, *supra* note 15, at 968-78 (discussing lower court cases after *Celotex III*).

113. *Celotex IV*, 826 F.2d 33 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1028 (1988).

114. See *supra* note 17.

115. This conclusion was a dubious one, as pointed out by Judge Bork in dissent, since the letter appears to have been neither made nor kept in the ordinary course of business, but to

never objected to the District Court's consideration of [it]."<sup>116</sup> Additionally, the majority stated that even if the letter itself were not admissible, Mrs. Catrett had indicated that "the substance of the letter is *reducible* to admissible evidence in the form of trial testimony,"<sup>117</sup> since she named Hoff as a witness in her answers to interrogatories.<sup>118</sup>

In evaluating the *Celotex IV* majority's response to Justice Rehnquist's position on the admissibility issue, it is important to remember that the same panel had reversed the district court in *Celotex II*. The only door to reversal left open to the court of appeals on remand was the one created by Justice Rehnquist's suggestion that evidence "reducible" to admissibility at trial may be considered.<sup>119</sup>

Judge Bork was not able, or at least not willing, to follow Justice Rehnquist and the Court on the admissibility issue.<sup>120</sup> Rejecting the majority's reasoning in *Celotex IV*, and implicitly the majority opinion in *Celotex III* as well, he reiterated in his dissent the traditional view: "It is settled law that the judge may consider only these specific materials [listed in Rule 56(c) and (d)] or other evidence that would be admissible at trial. Inadmissible evidence is not to be considered unless, like an affi-

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have been written in connection with the plaintiff's lawsuit. See *Celotex IV*, 826 F.2d at 42 (Bork, J., dissenting); FED. R. EVID. 803(6).

116. *Celotex IV*, 826 F.2d at 37 (emphasis omitted). This point was disputed by Judge Bork as well. *Id.* at 42. The transcript of the summary judgment hearing in the district court, however, shows that both parties referred District Judge Richey to the Hoff letter. *Celotex* appears to have been using it to bolster its argument that there was no evidence of exposure within the District of Columbia. An attorney representing *Celotex* said, "By the plaintiff's own documents . . . the only exposure . . . to any *Celotex* product by the decedent was in Chicago . . . there is a letter from a T.R. Huff [*sic*] . . . saying that he did work for their company . . ." Joint Appendix I, *supra* note 16, at 211. Although it appears that *Celotex* also attempted to argue that the letter itself could not be considered in opposition to the motion ("there is no affidavit to support [the claimed exposure]," *Id.* at 212), no formal objection was made and the point was never clarified.

117. *Celotex IV*, 826 F.2d at 38 (emphasis added). The majority cited Justice Rehnquist's statement in *Celotex III* that the nonmoving party need not "produce evidence in a form that would be admissible at trial in order to avoid summary judgment." *Id.* They declined to consider the Catrett deposition on the grounds that it would "not unlikely" be held inadmissible at trial and that *Celotex* had specifically objected to the district court's considering it. They also rejected the O'Keefe letter on the grounds that it was not based on personal knowledge but was "merely a restatement of the Hoff letter." *Id.* at 39 n.13.

118. Plaintiff's Supplemental Answers to Defendant's Interrogatories, filed in February 1982 after *Celotex*'s second summary judgment motion was filed, listed Hoff as "a person 'having knowledge of facts relevant to the subject matter in this lawsuit.'" *Id.* at 36.

119. Indeed, in *Celotex II*, the majority had said that if *Celotex* had met its initial burden, the inadmissibility of Mrs. Catrett's evidence would have been "fatal." *Celotex II*, 756 F.2d 181, 187 (D.C. Cir. 1985).

120. Judge Bork did not explain how his position on the admissibility issue could be squared with the Court's opinion in *Celotex III*.

davit, it is 'otherwise provided for' in Rule 56."<sup>121</sup> He contended that a departure from the traditional rule would introduce uncertainty into summary judgment proceedings and create conflict with the Supreme Court's apparent goal of encouraging increased use of summary judgment in appropriate cases. In his view, the majority's position would force trial judges to consider "various permutations of vague and inadmissible evidence" when deciding summary judgment motions.<sup>122</sup> Additionally, Judge Bork feared that judges would have to apply the newly enunciated directed verdict standard to evidence that "may emerge" at a later date. This would create an "automatic and unrequested extension" of the time for the nonmoving party to respond with admissible evidence to establish its case.<sup>123</sup> Hence, on remand, the majority and dissent in *Celotex IV* ended up as far apart on the admissibility issue as they had been on the initial burden standard in *Celotex II*.

A recent Eleventh Circuit case, *Offshore Aviation v. Transcon Lines, Inc.*,<sup>124</sup> also illustrates the confusion engendered by *Celotex III*. The case involved a claim for damages for goods destroyed while in the possession of defendant Transcon. The district court granted Offshore's motion for summary judgment for the full amount of its claim. Transcon, the nonmoving party, argued on appeal that a letter attached as an exhibit to a deposition, indicating that the goods were "in an unserviceable state" when shipped, should have been considered by the district court in ruling on summary judgment.<sup>125</sup> Offshore responded that the letter was inadmissible hearsay. The majority ruled that the hearsay objection had been waived by Offshore's failure to raise it below. Further, it stated that under *Celotex III* "[c]onsideration of the letter does not turn on admissibility at trial but on availability for review."<sup>126</sup> Indeed, the majority indicated that the requirement in an earlier Eleventh Circuit case that evidence be admissible to be considered in opposition to summary judgment<sup>127</sup> was no longer valid: "*Celotex [III]* has clearly held otherwise in making a distinction between evidence admitted for trial and evidence admitted for avoidance of summary judgment."<sup>128</sup>

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121. *Celotex IV*, 826 F.2d at 41.

122. *Id.* at 42.

123. *Id.* at 42-43. Celotex's petition for a writ of certiorari on the admissibility issue was denied on February 22, 1988, 108 S. Ct. 1028 (1988).

124. 831 F.2d 1013 (11th Cir. 1987).

125. Apparently, the letter was neither authenticated nor brought within any hearsay exception in the course of the deposition.

126. *Id.* at 1015.

127. *Tippens v. Celotex Corp.*, 805 F.2d 949, 955 n.7 (11th Cir. 1986), *reh'g denied*, 815 F.2d 66 (11th Cir. 1987).

128. *Offshore Aviation*, 831 F.2d at 1015 n.1.

In a concurrence, however, Judge Edmondson emphasized the "gratuitous" nature of the majority's comments on the meaning of *Celotex III*, given that Offshore failed to raise the hearsay objection below. He emphasized that the law of the Eleventh Circuit had always required that evidence in opposition to a summary judgment motion be admissible at trial, although "the Supreme Court could change the law."<sup>129</sup> He doubted the majority's reading of Justice Rehnquist's language (although the documents objected to in *Celotex III* were also claimed to be inadmissible hearsay) and "question[ed] whether we should wipe out established circuit law in the absence of a truly definitive statement by the Supreme Court that otherwise inadmissible hearsay can be properly and effectively used to oppose a motion for summary judgment."<sup>130</sup>

The Third Circuit has also read *Celotex III* as changing the standards for considering the nonmoving party's evidence in opposition to summary judgment. In *Bushman v. Halm*,<sup>131</sup> the plaintiff sought damages for injuries suffered in a head-on collision with a postal service jeep. The defendant's motion for summary judgment was granted on the grounds that the evidence presented by the plaintiff was insufficient to establish factual or legal causation.<sup>132</sup> The Third Circuit vacated and remanded to the trial court with directions to clarify the treatment the district judge had given to a letter-report from the plaintiff's doctor regarding his injuries. It appeared likely that the report, which was "not in affidavit form nor authenticated as required by rule 56(e),"<sup>133</sup> had been ignored by the district judge. Although the decision to vacate did not depend on the treatment of the report,<sup>134</sup> the court pointed out that the Supreme Court in *Celotex III* had "ruled that in meeting the issues raised by a Rule 56 motion, the nonmoving party is not obligated to produce rebuttal evidence which would be admissible at trial."<sup>135</sup>

Other courts which have considered the admissibility issue have simply failed to take the Supreme Court at its word. For example, in *Canada v. Blain's Helicopters, Inc.*,<sup>136</sup> the Ninth Circuit refused to consider unauthenticated fuel invoices submitted by the plaintiff in opposi-

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129. *Id.* at 1016-17.

130. *Id.* at 1017.

131. 798 F.2d 651, 653 (3d Cir. 1986).

132. *Id.* at 655.

133. *Id.* at 655 n.5.

134. After examining relevant case law, the Third Circuit concluded that expert testimony was not required to establish causation in all negligence cases, and that plaintiff's affidavit on that issue should not have been ignored by the district judge in ruling on the summary judgment motion. *Id.* at 657-60.

135. *Id.* at 654-55 n.5.

136. 831 F.2d 920 (9th Cir. 1987).

tion to a motion for summary judgment. Relying on older treatises and case law, the court of appeals found the evidence unacceptable, even though the plaintiff argued that the Supreme Court had just opened the door to such evidence in *Celotex III*. The court of appeals brushed the plaintiff's argument aside, concluding that the "quoted sentence [in *Celotex III*] upon which Canada relies should not be read to allow evidence inadmissible in form if such evidence is not allowed by Rule 56(c)."<sup>137</sup>

## VI. Summary Judgment After *Celotex III*

Since the Supreme Court denied certiorari in *Celotex IV*, the admissibility issue discussed above<sup>138</sup> apparently will not be resolved in the near future. Some courts of appeals have been unwilling to lend credence to Justice Rehnquist's words on the subject in *Celotex III*. While they may have the better argument on policy grounds, they have ignored the Supreme Court's willingness to allow the use of evidence merely reducible to admissibility to meet the nonmoving party's burden to respond. This section explores what the moving and nonmoving parties must do, under *Celotex III*, to meet their respective burdens on summary judgment.<sup>139</sup>

### A. The Moving Party Will Have the Burden of Proof at Trial

When the moving party will have the burden of proof at trial, summary judgment will be granted only if she makes a showing sufficient to establish that there is no genuine issue as to any material fact that she must prove at trial and that she is entitled to judgment as a matter of law. Only if no reasonable jury could find for the nonmoving party on the evidence presented should the moving party be entitled to prevail without a full trial on the issues. There is no indication that *Celotex III* authorizes the use of inadmissible evidence by a *moving* party in support of its motion; the *Celotex III* majority discussed only what evidence will be accepted from a *nonmoving* party. It would be difficult to justify al-

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137. *Id.* at 925. The court stated that Justice Rehnquist's language about evidence not having to be in a form admissible at trial referred "to the other means enumerated in Rule 56(c) for persuading the court that summary judgment is inappropriate including affidavits, which are evidence produced in a form that would not be admissible at trial." *Id.* This gloss makes no sense in light of the documents actually before the Court in *Celotex III*.

138. See *supra* sections III (B) and IV.

139. This Article will discuss only situations in which facts are allegedly in dispute when the motion is made. When the facts are agreed upon, a summary judgment motion presents only a question of law to be decided by the court (e.g., the interpretation of a contract term). See 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 2725 and cases cited at 75-83 ("If no such [factual] issue exists, the rule permits the immediate entry of judgment.").

lowing the party that will have the burden of proof at trial to avoid trial and to win summary judgment with anything but admissible evidence, since the results at trial might well turn on whether certain proffered evidence was admissible. Thus, *Celotex III* should not affect the moving party's initial burden or its obligation to use only admissible evidence in this situation. The nonmoving party on such a motion, however, apparently would be able to defeat the motion by producing *inadmissible* evidence, "reducible" to admissible form at trial, if a genuine issue of material fact is raised.<sup>140</sup>

#### B. The Nonmoving Party Will Have the Burden of Proof at Trial

When the nonmoving party will have the burden of proof at trial both *Celotex III* and *Anderson* come into play. The Court in *Celotex III* explicitly applied the *Anderson* directed verdict standard to the nonmoving party.<sup>141</sup> In this situation, the moving party may meet its initial burden in either of two ways: (1) by producing affirmative evidence to negate an essential element of the nonmoving party's case, or (2) by "showing" the court, after appropriate time for discovery,<sup>142</sup> that the record is devoid of legally sufficient evidence to establish an essential element of the nonmoving party's case. In the first instance, if the moving party meets its initial burden, the nonmoving party has two options. First, it may respond with evidence of the element sought to be negated.

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140. Although this seems to be a necessary implication of the Supreme Court's decision in *Celotex III*, it is an unfortunate change in summary judgment law. See *supra* notes 106-11 and accompanying text.

141. *Celotex III*, 477 U.S. 317, 323 (1986). The application of the directed verdict standard to a nonmoving party who will have the burden of proof at trial does away with any lingering notions that a summary judgment motion can be successfully opposed with a "scintilla" of evidence or that it must be denied whenever there is the "slightest doubt" as to the facts. 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 2727 and cases cited therein; see, e.g., *Security Ins. Co. of Hartford v. Wilson*, 800 F.2d 232, 234 (10th Cir. 1986) (citing *Celotex III*) ("In opposing a motion for summary judgment, the [nonmoving party] had the burden to come forward with other evidence . . . to raise a genuine issue of material fact for trial on those essential elements of their claim. Their failure to do so . . . amply supports the district court's summary judgment against them . . ."). In the Second Circuit—which has long been thought particularly hostile to motions for summary judgment, see Bracht, *Has Summary Judgment Been Eliminated in the Second Circuit?*, 46 BROOKLYN L. REV. 565 (1980)—the court has cited the Supreme Court's current view of the role of summary judgment to encourage its renewed use. *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986) ("It appears that in this circuit some litigants are reluctant to make full use of the summary judgment process because of their perception that this court is unsympathetic to such motions. . . . Whatever may have been the accuracy of this view in years gone by, it is decidedly inaccurate at the present time . . ."), *cert. denied*, 107 S. Ct. 1570 (1987).

142. As argued above, focusing merely on the elapsed time for discovery, rather than on the actual discovery efforts made, misses the point. See *supra* notes 63-65 and accompanying text.



Such evidence must be "reducible" to admissible form at trial and be sufficient to withstand a directed verdict motion at trial on that issue.<sup>143</sup> Second, the nonmoving party may respond with a Rule 56(f) motion seeking a continuance to obtain further evidence. If the moving party has shown that the record is devoid of sufficient evidence to establish an essential element of the case (the situation discussed in *Celotex III*), the nonmoving party may respond in any of three ways: (1) by showing that the record in fact contains supporting evidence "overlooked or ignored"<sup>144</sup> by the moving party, who has thus failed to meet his initial burden; (2) by producing additional evidence, "reducible" to admissible form at trial, sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency;<sup>145</sup> or (3) by making a Rule 56(f) motion explaining why further time for discovery is required. Figure 1 illustrates the various possibilities.

### Conclusion

*Celotex III* sends a mixed message to litigants and lower courts by making it both easier and harder to obtain summary judgment. The majority made it easier for the moving party to meet its initial burden, at least when the nonmoving party will have the burden of proof at trial, by rejecting the idea that the moving party must always negate the nonmoving party's claim.<sup>146</sup> The thrust of that change, however, is considerably weakened by the Court's suggestion that evidence in opposition to summary judgment will be acceptable even if it is merely "reducible" to admissible evidence at trial.

The new position on admissibility has no support in Rule 56, nor was any set forth in the Court's brief comments on the admissibility issue in *Celotex III*. The use of such evidence in deciding summary judgment motions will increase the uncertainty of the proceedings and work against the Court's aim of encouraging the use of summary judgment in

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143. See *supra* note 140.

144. *Celotex III*, 477 U.S. at 332 (Brennan, J., dissenting).

145. See *supra* note 140.

146. The change in the initial burden standard announced in *Celotex III* also greatly enhances the impact of applying the *Anderson* directed verdict standard to evidence presented by a nonmoving party who will have the burden of proof at trial. Under the more stringent standard, which requires the moving party to negate the nonmoving party's case entirely in order to meet its initial burden, the number of times when the nonmoving party's evidence would actually have been put to the *Anderson* test would have been considerably fewer.

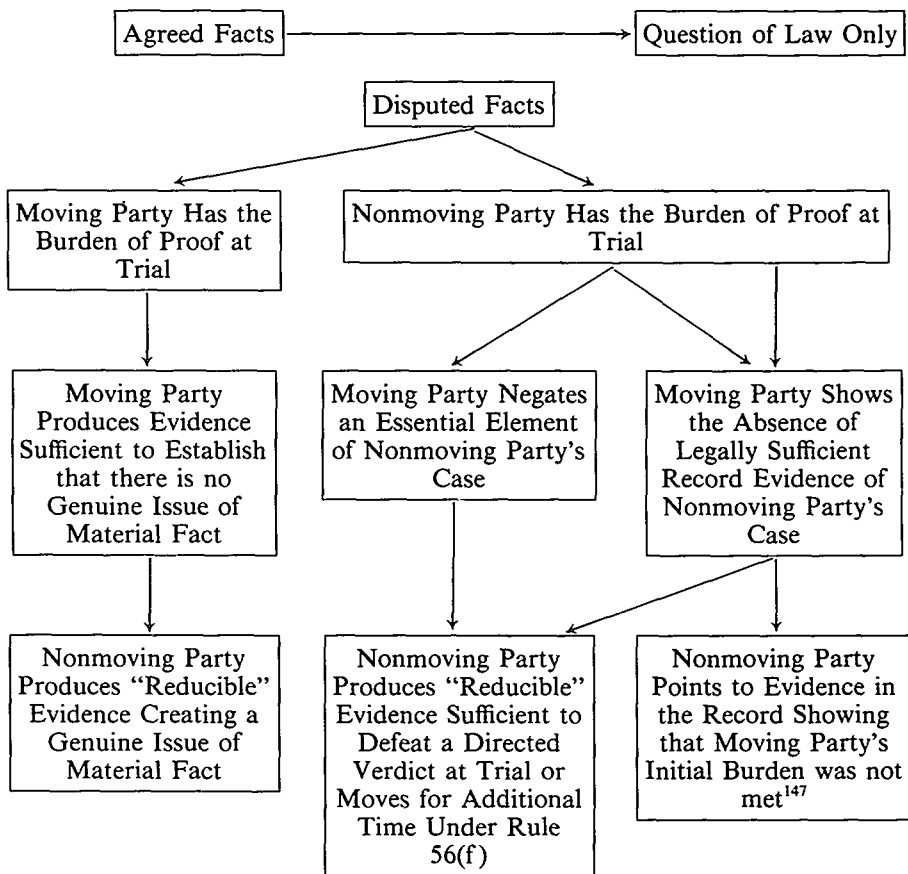


Figure 1.

147. The majority in *Celotex III* did not make this possibility explicit, but Justice Brennan did. *Celotex III*, 477 U.S. at 332 (Brennan, J., dissenting).

appropriate cases. It will make it harder rather than easier "to isolate and dispose of factually unsupported claims or defenses."<sup>148</sup>

If the Court is serious about encouraging the use of summary judgment to reduce the costs and delay of a full trial for any claim that meets notice pleading standards,<sup>149</sup> it will have to address the problem it created by its holding on procedural admissibility in *Celotex III*. The changes in summary judgment procedure heralded by *Anderson* and the initial burden holding in *Celotex III* are likely to have little impact if the proceedings get bogged down in a needless examination of the hypothetical ways the nonmoving party's evidence might be reduced to admissible form by the time of trial. To remedy this problem, the Court should articulate clearly the requirements for meeting the moving party's initial burden, including the obligation to do adequate discovery before moving for summary judgment on the grounds that the nonmoving party lacks legally sufficient evidence to prove its case. Moreover, the Court should clarify that evidence in the record that is merely reducible to admissible form *is* sufficient to oblige the moving party to do further discovery before claiming that the record is devoid of evidence of some essential element of the nonmoving party's case. The Court, however, should forsake the misguided position that evidence merely reducible to admissible form is also adequate to oppose a summary judgment motion once the moving party has met its initial burden. At that point, only evidence already reduced to admissible form, or otherwise provided for by Rule 56, should be considered so that the trial judge can make a reliable decision about the nonmoving party's ability to get to the jury at trial. Without these changes, the Court's laudable goal of encouraging the use of summary judgment in appropriate cases will not be achieved.

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148. *Celotex III*, 477 U.S. at 323-24.

149. The majority in *Celotex III* noted that since the advent of notice pleading, motions to dismiss a complaint or to strike a defense seldom succeed, and the motion for summary judgment has taken their place as a way of preventing factually insufficient claims and defenses "from going to trial with the attendant unwarranted consumption of public and private resources." *Id.* at 327.

